ministering a foreign law one may ask whether the mode of reasoning, the judicial method and traditional analogies are not more significant than the detailed rules. At any rate the picture, so often painted, of peoples under British dominion enjoying their own traditional laws, scrupulously administered for them by the British courts, needs some retouching.

IMPLIED WARRANTY OF FOOD. — It is settled by numerous English and American decisions that one who sells food for immediate consumption impliedly warrants that it is wholesome.[1] Obvious as it is, the distinction between the absolute liability of a warrantor of food irrespective of negligence, and the liability of a tortfeasor for negligence is sometimes blurred. Often, perhaps generally, a seller of injurious food has been guilty of negligence, and in a particular case it may become immaterial whether the defendant's liability is absolute or based on negligence. Often, however, the distinction is vital. It is important not only in determining questions of liability between the original parties to a transaction but because a warranty gives a right only to the immediate purchaser,[2] while a negligent seller of dangerous food may be liable to any person ultimately injured.[3]

Several recent decisions call attention to the boundaries of the principle of absolute liability for the wholesome character of food. At the outset it should be said that it is well recognized that unless food is sold by a dealer for immediate consumption, there is no implied warranty except under circumstances where a warranty would be implied in the sale of goods of other kinds.[4] Where the buyer himself examines and selects the food which he purchases, the existence of a warranty has been denied,[5] on the ground that the buyer does not rely on the seller's skill and judgment but on his own. The reasoning seems inconclusive. Such a buyer may rely on the seller's judgment by assuming as he fairly may that all the articles offered to him are suitable for food, and when he chooses one article rather than another, he should be regarded, unless the defect is an obvious one, as seeking merely the best of a number of things all of which are at least not dangerous to eat.[6] The warranty does not extend to sales of food for cattle.[7] It has recently been held inapplicable to the sale of canned goods,[8] because, it is said the seller

[1] Recent decisions are: Frost *v.* Aylesbury Dairy Co. Ltd. [1905] 1 K. B. 608; Askam *v.* Platt, 85 Conn. 448, 83 Atl. 529 (1912); Ward *v.* Great Atlantic & Pacific Co. (Mass.) 120 N. E. 225 (1918); Race *v.* Krum, 222 N. Y. 410, 118 N. E. 853 (1918).

[2] WILLISTON, SALES, § 244.

[3] Ketterer *v.* Armour, 247 Fed. 921 (1912); Parks *v.* C. C. Yost Pie Co., 93 Kans. 334, 144 Pac. 202 (1914).

[4] WILLISTON, SALES, § 242.

[5] Farrell *v.* Manhattan Market Co., 198 Mass. 271, 84 N. E. 481 (1908); Gearing *v.* Berkson, 223 Mass. 257, 259, 111 N. E. 785 (1916).

[6] See Wallis *v.* Russell, [1902] 2 Ir. 585; Sloan *v.* F. W. Woolworth Co., 193 Ill. App. 620 (1915).

[7] Dulaney *v.* Jones, 100 Miss. 835, 57 So. 225 (1911); F. A. Piper Co. *v.* Oppenheimer, 158 S. W. 777 (1913).

[8] Bigelow *v.* Maine Central R. Co., 110 Me. 105, 85 Atl. 396 (1912) (commented on in 26 HARV. L. REV. 556); Trafton *v.* Davis, 110 Me. 318, 86 Atl. 179 (1913).

cannot possibly discover that a particular can of a reputable brand of goods is defective, and therefore it is unjust to subject him to liability. The same argument, however, may be made in regard to any implied warranty not only of food but of other articles where the seller could not discover the injurious defect. Accordingly if canned goods are to be made an exception to the general rule governing sales of food, the whole law of implied warranty should be revised. As an original question it might well be argued that the rule of the Roman law and modern civil law which denies any other redress than rescission or diminution of the price to a buyer of defective goods, unless the seller makes express representations, or has guilty knowledge of the defect,[9] is a better rule than that of the common law which may subject a seller, guilty of no improper or negligent conduct, to heavy liability for consequential damages.

But the general principle of the common law is well established, and though it may bear heavily on an innocent seller in a particular case, the natural effect of it will be to diminish the sale of defective goods; and it must be remembered that the seller is far better able to hold liable the manufacturer who sold him the goods, than is the ultimate buyer. Certainly if a seller is ever to be made liable for injuries caused by defective goods, where he has been guilty of no fault, the reasons are stronger for holding him liable for selling defective food than in any other kind of sale — whether the matter is considered from the standpoint of precedent or of policy. In accordance with this general principle, the Massachusetts court has recently held,[10] following other recent cases,[11] that the sale of canned food is subject to the same rules of implied warranty as govern sales of other food.

The liability of a restaurant-keeper for damages caused by bad food served by him has also been tested in recent decisions. This question is sometimes supposed to depend on whether the restaurant-keeper makes a sale to the customer of the injurious food. It is indeed true that if the transaction amounts to a sale the numerous authorities referred to above establish liability. On excellent authority,[12] however, it is held that the title to food served by an innkeeper never passes. Whether this analogy holds good in a restaurant where a customer pays not for a meal, but for a definite portion of food, may perhaps be questioned. May not one who secures and pays for a piece of pie at an "automat" or luncheon spa take it from the plate and walk off with it without wrong? [13] Whether or not because the transaction has been held not to be a sale, it has generally been assumed that the liability of a restaurant-keeper is based only on willful fault or negligence, and many cases have been brought on this assumption. In most of them no asser-

[9] See WILLISTON, SALES, § 247. As to a presumption of knowledge on the part of a manufacturer, see Doyle *v.* Fuerst and Kraemer, Ltd. 129 La. 838, 56 So. 906 (1911).

[10] Ward *v.* Great Atlantic & Pacific Tea Co. (Mass.) 120 N. E. 225 (1918).

[11] Jackson *v.* Watson, [1909] 2 K. B. 193; Sloan *v.* F. W. Woolworth Co., 193 Ill. App. 620 (1915).

[12] See BEALE, INNKEEPERS, § 169, and cases cited.

[13] This distinction is suggested in Valeri *v.* Pullman Co., 218 Fed. 519, 520 (1914).

tion by the plaintiff of the defendant's absolute liability was made, but in a few recent cases the contention was made and denied.[14]

The Massachusetts Supreme Court,[15] and the Appellate Division of the New York Supreme Court [16] however, have recently upheld it, and with good reason. Even though the transaction is not a sale, every argument for implying a warranty in the sale of food is applicable with even greater force to the serving of food to a guest or customer at an inn or restaurant. The basis of implied warranty is justifiable reliance on the judgment or skill of the warrantor, and to charge the seller of an unopened can of food for the consequences of the inferiority of the contents of the can, and to hold free from liability a restaurant-keeper who opens the can on his premises and serves its contents to a customer, would be a strange inconsistency. A sale is not the only transaction in which a warranty may be implied.

The facts of the Massachusetts case suggest the inquiry, how far does the obviousness of the injurious character of food affect the defendant's liability. The plaintiff ordered baked beans. When the food was served, she noticed two or three dark or black objects almost as big as beans. She thought they were hard baked beans, without preliminary testing she "bit down hard on them" and broke two teeth. It is evident that recoverable damages for breach of warranty cannot include consequences that reasonably should have been avoided,[17] and whether the observed peculiarities of food served or purchased are such as to make consumption of it unreasonable may present a question of fact to be decided by the jury.[18]

An interesting decision to compare with the Massachusetts case just referred to, was handed down by the same court on the same day,[19] deciding adversely to the plaintiff an action of tort alleging negligence. It appeared that a small tack in a piece of blueberry pie served by the defendant had lodged in the throat of the plaintiff, but because of her inability to prove that the defendant was negligent, the decision of the lower court in favor of the plaintiff was set aside. The principle of *res ipsa loquitur* was held inapplicable, the tack being so small that it

[14] Valeri *v.* Pullman Co., 218 Fed. 519 (1914); Merrill *v.* Hodson, 88 Conn. 314, 91 Atl. 533 (1914); Travis *v.* Louisville, etc. R. Co., 183 Ala. 415, 62 So. 851 (1913); Sheffer *v.* Willoughby, 163 Ill. 518, 45 N. E. 253 (1896).

[15] Friend *v.* Child's Dining Hall Co. (Sup. Jud. Ct. Mass., October, 1918).

[16] Leahy *v.* Essex Co., 164 N. Y. App. Div. 903, 148 N. Y. Supp. 1063 (1914); Muller *v.* Child's Co., 171 N. Y. Supp. 541 (1918); Barrington *v.* Hotel Astor, 171 N. Y. Supp. 840 (1918).

The first of these cases was decided before the determination by the Court of Appeals of Race *v.* Krum, 222 N. Y. 410, 118 N. E. 853 (1918). That case involved the liability of a druggist for serving bad ice cream of his own manufacture, and the court, without intimating what its decision would be in case of an innkeeper or restaurant-keeper who did not "make or prepare" the food in question, expressly stated that its decision did not necessarily control such a case.

In the later decisions of the Appellate Division, however, a restaurant-keeper and an innkeeper were held liable. In Muller *v.* Child's Co., the qualification in Race *v.* Krum was not noted, and in Barrington *v.* Hotel Astor, it was said that the hotel "prepared" the dish of kidney sauté which was in question.

[17] WILLISTON, SALES, § 614, note 31.

[18] The Massachusetts decision admits that the question is one of fact. See also Sloan *v.* F. W. Woolworth Co., 193 Ill. App. 620, 625 (1915).

[19] Ash *v.* Child's Dining Hall Co. (Sup. Jud. Ct. Mass., October, 1918).

readily might have been imbedded in a blueberry and escaped the most careful scrutiny. The consistency of the decision with that previously discussed seems open to question. It is held in Massachusetts,[20] following the early law of England, still generally prevailing where common-law forms of action are preserved,[21] that action on a warranty may be in tort and neither *scienter* nor negligence on the part of the defendant need be alleged or proved. Since this is true, it is difficult to see why a plaintiff should lose his case by the superfluous allegation of negligence, if, as can hardly be doubted, his pleading contained a statement of all the facts necessary to establish an implied warranty within the principle simultaneously announced by the Massachusetts court.[22]

RIGHT OF PUBLIC SERVICE COMPANY TO ALTER RATES FIXED BY CONTRACTS. —The problem which the public utilities of the country are seeking to solve to-day is how they may legally increase their rates in spite of long term contracts with private consumers, which in many instances call for service at prices below present costs,[1] and especially do they want to know whether they may do this on their own initiative, or must they first obtain the permission of the commission or other rate regulating body.

In *V. & S. Bottle Co.* v. *Mountain Gas Co.*[2] the Supreme Court of Pennsylvania recently upheld the legal right of the defendant natural gas company to discontinue service under a low-rate, ten-year contract entered into between its predecessor and the plaintiff in October, 1913, and to require the latter to pay increased rates as per schedule filed by the defendant with the State Public Service Commission, on the ground that though said contract was valid and binding between the parties when made it became unlawful and inoperative when the public utility act[3] went into effect January 1, 1914, as it contravened the provisions of that statute against discrimination.

It is settled that the general police power of the state embraces the regulation of the service and rates of public utility enterprises for the promotion of public convenience and the general welfare,[4] and that

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[20] Farrell *v.* Manhattan Market Co., 198 Mass. 271, 274, 84 N. E. 481 (1908).

[21] Shippen *v.* Bowen, 122 U. S. 575 (1887).

[22] Ash *v.* Child's Dining Hall Co. follows Crocker *v.* Baltimore Dairy Lunch, 214 Mass. 177, 100 N. E. 1078 (1913), where it appears that the plaintiff declined to amend his declaration by adding a count in contract, and the court, making the common but erroneous assumption that implied warranty is based on promise rather than representation, said, "whether the plaintiff might have relied upon an implied warranty . . . is not now to be considered." Presumably the counsel for the plaintiff in both the Crocker and the Ash cases failed to urge upon the court the reasoning here suggested.

[1] See *Re* Marion Light & Heating Co. (Ind. Pub. Serv. Com.), P. U. R. 1918 D, 692; *Re* Oklahoma Gas & Electric Co. (Okla. Corp. Com.), P. U. R. 1918 D, 216.

[2] Pa. Sup. Ct., June 3, 1918, 13 Rate Research, 335.

[3] Pennsylvania Public Service Company Law (1913), 6 PURDON'S DIGEST, 7206; Supplement, 1915.

[4] Munn *v.* Illinois, 94 U. S. 113 (1876); Chicago, Burlington & Quincy R. Co. *v.* Iowa, 94 U. S. 155 (1876); Chicago, Burlington & Quincy R. Co. *v.* Nebraska, 170 U. S. 57, 71–72 (1898); Portland Railway, Light & Power Co. *v.* Oregon Railroad